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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR LISAK,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF INDIANA and
MERCANTILE BANCORP, INC., JOHN WIDMAR,
HARRY F. SMIDDY, JR.; and UNKNOWN DEFENDANTS,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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**STATUTES AND RULES
INVOLVED**

Appellate Rule 4. Consideration Of Appeals

(A) **Appeals From Final Judgments.** Appeals may be taken by either party from all final judgments of circuit, superior, probate, criminal, juvenile, county, and where provided by statute for municipal Courts. A ruling or order by the trial court granting or denying a motion to

correct errors shall be deemed a final judgment, and an appeal may be taken therefrom. . . .

Trial Rule 54. Judgment; Costs

(A) **Definition—Form.** “Judgment” as used in these rules includes a decree and order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Trial Rule 59. Motion To Correct Error

. . . .

(C) **Time for Filing: Service on Judge.** A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. . . .

Original Action Rule 2. Applications For Writs

(B) **Submission of Applications to Supreme Court Administrator.**

No application for a writ of mandamus or prohibition and no application papers shall be filed by any party with the Clerk of the Supreme Court until after the hearing on the application, and only then when and as permitted by O.A. Rule 5.

(C) **Original Actions Viewed With Disfavor.** Original actions are viewed with disfavor, and may not be used as substitutes for appeals.

ARGUMENT IN REPLY

The Respondents' Brief in Opposition tacitly admits the importance of this case and why certiorari should be granted by limiting the Opposition Brief to raising for the first time the issue of jurisdiction.

This challenge to jurisdiction is contradictory to the assertion of claims by Respondents made below in the Federal Courts that this Indiana Court Order should be used as the basis of Res Judicata and Issue Preclusion to bar Petitioner's Federal diversity action.

This challenge rests solely on 28 U.S.C. § 1257(3) but by inescapable inference applies to the Federal Court below. By an illogical and erroneous argument, the Respondents' Opposition Brief somehow rationalizes that this certiorari petition seeking review of the Order of the decision and opinion of the United States Court of Appeals for the Seventh Circuit is the same as a certiorari under 28 U.S.C. § 1257(3), a final judgment rendered by the highest Court of a State where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes, of, or . . . authority exercised under the United States.

Simply stated, Respondents' Opposition Argument merely raises the issue as to whether a Federal District Court *sitting in diversity* is being called upon to act as an Appellate or Reviewing Court of an Indiana State Trial Court in determining whether from the prior proceedings that occurred in that Indiana State Trial Court, those proceedings are entitled to be considered as foreclosing a

later litigation brought in the Federal District Court by the Doctrine of Res Judicata and Issue Preclusion. The answer to this inquiry is so basic and fundamental that no authority need be cited to support the answer of “No” to this issue. A mere reading of the Order of the United States District Court in this case that is set out in Appendix B-11 supported by the Indiana case law cited sets forth the essential elements under Indiana law which are required to apply the Doctrine of Issue Preclusion. Unmistakably and essential to the application of that Doctrine to the case before the Court, is that there be a *final* decision which would trigger the use of such decision in this subsequent proceeding as Res Judicata or Issue Preclusion. But since the prior Order by the Indiana State Court is neither final or appealable, that Order could never trigger the application of Issue Preclusion or Res Judicata to bar Plaintiff’s subsequent action in diversity in the United States District Court below.

This is so because Rule 4 of Rules of Appellate Procedure of Indiana (Title 34, Indiana Code—Civil Procedure 1987) requires that appeals be taken from final judgments. Trial Rule 54(A) of the Indiana Trial Rules (Title 34, Indiana Code—Civil Procedure 1987) defines that only an Order from which an appeal lies is to be considered under Trial Rule 59(C) of the Trial Rules of Indiana as one that is to be considered a final or appealable Order. If the Order cannot be appealed, then it cannot be considered a final Order. Both the Order set forth in the Petition at D-2 and page 5 of Respondents’ Opposition Brief clearly admit and explain that this Order by the Indiana State Trial Court could not be appealed and therefore it follows that it could not be a final judgment or Order. Lacking the finality required as an essential element for the appli-

cation of Issue Preclusion as determined and explained by the United States District Court Order set forth at B-11 of the Appendix to the Petition, the Doctrine of Issue Preclusion and Res Judicata without anything more, could not be correctly applied in this case by both the United States District Court and the United States Court of Appeals to bar Plaintiff's Diversity of Citizenship Action in the Federal Court below.

Suggesting at page 5 of the Opposition Brief and the opinion below by the United States Court of Appeals set forth at A-4 of the Appendix to the Petition that Mandamus is a substitute for appeal further ignores the prohibition of Rule 2(C) (Title 34, Indiana Code—Civil Procedure 1987) of the Procedure for Original Actions (before the Indiana Supreme Court), which prevents and precludes a Mandamus as being used as a substitute for an appeal.

The Respondents' Opposition Brief and the opinion of the Court below to which this Certiorari Petition is addressed both overlook that the issue raised by a Mandamus Petition would necessarily be different than the issues that would be raised in an appeal, if permitted to be taken as allowed absolute by the Constitution of Indiana by which preclusion is enforced below. Thus, neither an appeal could happen nor occur and subsequently no final prior Order exists for the Court below to utilize for the application of the Doctrine of Res Judicata or Issue Preclusion.

CONCLUSION

The Petition for Certiorari is properly brought and if granted by the Court, the Court would not exceed its jurisdiction to do so.

Respectfully submitted,

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March, 1988

